92-1124

Supreme Court, U.S.
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No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLARKSON PUCKLE GROUP, LTD., ERAS (INTERNATIONAL), LTD., CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LTD., and BAIN CLARKSON, LTD.,

Petitioners,

—v.—

INTERNATIONAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; DOMINION INSURANCE COMPANY, LTD.; HANOVER REINSURANCE COMPANY, LTD.; ALPINA INSURANCE COMPANY, LTD.; BRITISH NATIONAL INSURANCE COMPANY, LTD.; CNA REINSURANCE OF LONDON, LTD.; ANCON INSURANCE COMPANY (U.K.), LTD.; PEOPLE'S INSURANCE COMPANY OF CHINA; ST. KATHERINE'S INSURANCE COMPANY, P.L.C.; INSURANCE CORPORATION OF IRELAND, P.L.C.; YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD.; SCAN RE INSURANCE COMPANY, LTD.; BAVARIAN REINSURANCE COMPANY; AND, SOCIETE COMMERCIALE DE REASSURANCE, S.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETER HOENIG*
LAWRENCE MENTZ
Counsel for Petitioners
BIEDERMANN, HOENIG, MASSAMILLO & RUFF
733 Third Avenue
New York, New York 10017
(212) 697-6555

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit has jurisdiction under § 16 (a)(1)(A) of the Federal Arbitration Act, 9 U.S.C. § 16 (a)(1)(A) (Supp. 1992), to review an order of the district court, that granted a stay of the action against Petitioners pending arbitration, but ordered Petitioners to *fully* participate *as parties* in pending and future pre-trial proceedings in the litigation, as an order "refusing a stay of any action under section 3 of [the Federal Arbitration Act, 9 U.S.C. § 3 (1988)]".

2. Whether the United States Court of Appeals for the Seventh Circuit has jurisdiction under the collateral order doctrine to review an order of the district court, that granted a stay of the action against Petitioners pending arbitration, but ordered Petitioners to *fully* participate *as parties* in pending and future pre-trial proceedings in the litigation, as an order denying Petitioners a "right not to be tried in the sense relevant to the *Cohen* exception", *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989).

RULE 29.1 LISTING

The parent companies of petitioner Clarkson Puckle Group, Ltd. are: Clarkson Puckle Holdings Limited; Inchcape Insurance Holdings Plc; Inchcape Overseas Limited; and, Inchcape Plc. There are no affiliates or subsidiaries that are not wholly owned.

The parent companies of petitioner ERAS (International), Ltd. are: Clarkson Puckle Ibex Limited; and, Clarkson Puckle Group Limited. There are no affiliates or subsidiaries that are not wholly owned.

The parent companies of petitioner Clarkson Puckle International Reinsurances, Ltd. are: Clarkson Puckle Overseas Holdings Limited; and, Clarkson Puckle Group Limited. There are no affiliates or subsidiaries that are not wholly owned.

The parent companies of petitioner Bain Clarkson, Ltd. are: Inchcape Insurance Holdings Plc; Inchcape Overseas Limited; and, Inchcape Plc. There are no affiliates or subsidiaries that are not wholly owned.

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Petitioners Clarkson Puckle Group, Ltd.; ERAS (International), Ltd.; Clarkson Puckle International Reinsurances,

Ltd.; and, Bain Clarkson, Ltd., pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on September 30, 1992.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dismissing Petitioners' appeal for want of jurisdiction, printed in the Appendix to this Petition at page 1a,[1] has not been reported officially or unofficially. The decision of the United States District Court for the Northern District of Illinois granting a stay of the action; but refusing a stay of pre-trial proceedings and requiring Petitioners to fully participate as parties in pending and future pre-trial proceedings in the litigation, printed at App. Pet. 3a and 19a, has not been reported officially and is reported unofficially at *International Insurance Co. v. Kerr*, No. 88 C 9838, 1991 U.S. Dist. LEXIS 19604 (N.D. Ill. Dec. 20, 1991).

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit was entered on September 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved are the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1988 & Supp. 1992). The pertinent provisions of the Federal Arbitration Act are printed at App. Pet. 35a-36a.

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1 Hereinafter cited as "App. Pet. ____."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendants citizens or subjects of foreign states. In the district court, the magistrate judge has issued a report and recommendation that subject matter jurisdiction properly exists under 28 U.S.C. § 1331, 18 U.S.C. § 1964(c), and on the basis of ancillary jurisdiction.

A. The Parties.

This action involves a dispute over the obligations and liabilities of various parties under an environmental impairment liability ("EIL") insurance program. Respondent International Insurance Company ("IIC"), an Illinois Corporation, was a primary insurer of risks under certain EIL policies. Respondents Underwriters at Lloyd's, London *et al.* ("Reinsurers"), are syndicates at Lloyd's of London and twelve reinsurance companies which provided reinsurance to Respondent IIC on certain EIL risks placed in the United States in the early 1980s. Respondent Societe Commerciale de Reassurance S.A. ("SCOR"), a French reinsurance company, was the alleged organizer of the reinsurance pool. Petitioners, four English companies, were the alleged managers of the pool.

B. Procedural History.

In November, 1988, Respondent IIC commenced an action against Respondent Reinsurers for reimbursement of payments made by Respondent IIC in settlement of an insurance claim made by SmithKline Beckman, Inc., under an EIL insurance policy issued by Respondent IIC. On June 13, 1990, Respondent IIC filed an amended complaint and supplemental complaint against Respondent Reinsurers. On August 8, 1990, Respondent Reinsurers obtained leave to, and thereafter, on March 27, 1991, filed an amended counterclaim against Respondent IIC alleging, *inter alia*, breach of reinsurance treaties and civil RICO violations.

On February 26, 1991, Respondent IIC alleging, *inter alia*, that it was merely the nominal insurer "fronting" for an international pool of reinsurers, filed a second amended and supplemental complaint and a third-party complaint joining the Petitioners and Respondent SCOR. All of the claims for relief alleged by Respondent IIC against Petitioners were predicated on two agreements executed in November, 1982, and January, 1983. Both contracts contained arbitration clauses. App. Pet. 8a-9a.

On June 7, 1991, Petitioners filed a motion, pursuant to § 3 of the Federal Arbitration Act, 9 U.S.C. § 3 (1988), to stay all further proceedings against Petitioners pending arbitration. Concurrently, Petitioners filed a motion, pursuant to Fed. R. Civ. P. 7(b) and 26(c), for a protective order staying all discovery and for an extension of time to plead to Respondent IIC's second amended complaint and third-party complaint while the motion to stay pending arbitration was under consideration.

On December 20, 1991, the magistrate judge recommended that the motion of Petitioners be granted and that Petitioners and Respondent IIC be ordered to arbitration. App. Pet. 3a-18a. On January 9, 1992, Respondent IIC filed objections to the report and recommendation for a stay pending arbitration pursuant to Fed. R. Civ. P. 72(b).

On January 15, 1992, notwithstanding the recommendation that Respondent IIC's claims against Petitioners be stayed pending arbitration, the magistrate judge denied Petitioners' June 7, 1991, motion for a protective order. App. Pet. 19a. And, *sua sponte*, ruled that discovery should nonetheless proceed against Petitioners as parties even if the district court accepted his report and recommendation. App. Pet. 24a. On January 24, 1992, pursuant to Fed. R. Civ. P. 72(a), Petitioners filed written objections to the magistrate judge's January 15, 1992, ruling.

On January 27, 1992, Petitioners filed a motion for a protective order temporarily staying discovery against Petitioners pending a determination by the district court of their objections

to the magistrate judge's January 15, 1992, ruling. One day later the magistrate judge denied Petitioners' motion for a protective order, only staying discovery against Petitioners until February 20, 1992, in order to permit Petitioners time to proceed to obtain a decision from the district court. App. Pet. 25a.

On February 4, 1992, and without prejudice to its objections to the report and recommendation, Respondent IIC served a demand for arbitration that, ultimately, encompassed all of the Petitioners.

On February 10, 1992, Petitioners made an emergency omnibus motion to the district court seeking a protective order temporarily staying discovery against Petitioners pending a determination by the district court of Petitioners' objections to the January 15, 1992, ruling and for a briefing schedule on those objections. On February 12 and February 26, 1992, the district court denied briefing on Petitioners' objections; overruled the objections; and, denied Petitioners' motion for a temporary stay. App. Pet. 26a and 27a.

On February 27, 1992, Petitioners filed a petition for writ of mandamus with the United States Court of Appeals for the Seventh Circuit. On March 13, 1992, the Seventh Circuit denied the petition for writ of mandamus in an order without opinion. App. Pet. 28a. And, on April 21, 1992, the Seventh Circuit denied the Petitioners' petition for rehearing with suggestion for rehearing *en banc*. App. Pet. 30a.

Respondent IIC then moved to withdraw its objections to the magistrate judge's report and recommendation, which motion was granted by the district court on May 27, 1992. App. Pet. 32a. Because the magistrate judge's report and recommendation did not constitute the action of the district court until accepted, 7 James W. Moore, *Moore's Federal Practice* ¶ 72.04, at 72-60 (2d ed. 1990), on June 4, 1992, the Petitioners filed a motion for acceptance by the district court of the report and recommendation for a stay pending arbitration, which was granted on June 12, 1992. App. Pet. 34a.

C. The Substance of the District Court's Order.

As a consequence of adopting the report and recommendation the district court, in staying the action against Petitioners pending arbitration, recognized that:

> The [Petitioners] may be in this forum solely because of their agreements with [Respondent] IIC. While they (or some of them) agreed to this forum, they agreed that disputes would be arbitrated in the first instance, with the limited discovery obligations that implies. They did not agree to submit to document requests and interrogatories from the [Respondent] reinsurers, with whom they have (in this forum) no dispute at all.

App. Pet. 23a.

The rationale asserted by the district court, however, for the proposition that notwithstanding the "stay" Petitioners should be subjected to pre-trial proceedings in the litigation was that:

(1) Respondent Reinsurers have the right to conduct discovery against the Petitioners as "parties" because the arbitration agreements with Respondent IIC do not shield them from discovery by Respondent Reinsurers.[2] App. Pet. 23a-24a; and,

(2) Respondent IIC should have the same right to discovery against the Petitioners as Respondent Reinsurers because the Petitioners' documents are necessary to adjudicate the claims between Respondent IIC and Respondent Reinsurers. App. Pet. 23a-24a.

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2 Neither Respondent Reinsurers nor Respondent SCOR have asserted claims against the Petitioners. In view of the pendency of massive litigation amongst them in the High Court in the United Kingdom (*see Societe Commerciale De Reassurance v. ERAS International Ltd.*, [1992] 1 Lloyd's Rep. 570 (Eng. C.A. 1991), as well as the fact that they are all aliens, it is extremely doubtful that Respondent Reinsurers or Respondent SCOR could properly assert any claims against the Petitioners in this litigation.

Since the "stay" ordered by the district court was one in name only or partial in its effect, the district court order has effectively refused to enforce the arbitration agreement between Petitioners and Respondent IIC in accordance with their expectations solely because of the pendency of non-arbitrable claims among Respondents.

D. The Dismissal of the Appeal.

The Petitioners appealed the district court order to the United States Court of Appeals for the Seventh Circuit on the ground that the order denied the stay to which the Petitioners were entitled under § 3, from which the Petitioners could appeal as of right pursuant to § 16(a)(1)(A) of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(A) (Supp. 1992). And on the additional ground that the order was a final collateral order immediately appealable because it finally determined the separate and important issue of whether a party directed to arbitration can, consistent with the language, goals and objectives of the Federal Arbitration Act, be required to simultaneously participate in pre-trial proceedings when no claims are pending against it.

In an order without opinion, Respondent IIC's motion to dismiss the appeal for lack of appellate jurisdiction was granted by the court of appeals on September 30, 1992. App. Pet. 1a. Accordingly, the court of appeals must have concluded that the partial stay was not a refusal to "stay any action under section 3," 9 U.S.C. § 16(a)(1)(A). And that the right to an arbitral forum is not a "right not to be tried in the sense relevant to the *Cohen* exception." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989).

If Respondent IIC had not wrongly sued the Petitioners in the first instance, Respondent Reinsurers would never have been entitled to pre-trial discovery of the Petitioners as parties. And Respondent IIC would have been entitled to discovery of Petitioners only as permitted by the arbitrators. As things now stand, however, the Petitioners must not only fully participate in pre-trial litigation as parties, producing discovery materials

and witnesses and responding to interrogatories, all under the supervision of the district court, but also must defend Respondent IIC's claims in arbitration.

REASONS FOR GRANTING THE WRIT

The point at which the right to an interlocutory appeal is triggered essentially delineates the authority of the district courts to act without the immediate appellate supervision Congress intended with the passage of § 16(a) of the Federal Arbitration Act. The fundamental question of whether, or to what extent, a district court can refuse to stay *all* the proceedings against a party entitled to an arbitral forum without triggering the right to the immediate appeal that Congress provided for in § 16 (a)(1)(A) of the Federal Arbitration Act, is not only one of first impression in the Court, but is of such paramount importance to litigants, the district courts and the courts of appeals as to warrant the Court's full consideration.

POINT I

SECTION 16 OF THE FEDERAL ARBITRATION ACT EXPLICITLY AUTHORIZES AN IMMEDIATE APPEAL OF A DISTRICT COURT ORDER REFUSING A STAY OF ANY ACTION; NOT ONLY TO SECURE THE COMPLETE BENEFITS OF AN ARBITRAL FORUM, BUT ALSO TO AVOID THE BURDENS OF THE LITIGATION PROCESS.

In order to clarify the congressional intent regarding appealability of arbitration orders, § 16 was added to the Federal Arbitration Act in 1988. *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1274 (6th Cir. 1990). Section 16 "rests on a choice to allow immediate appeal from orders that give litigation precedence over arbitration . . . [and] reflects a deliberate determination that appeal rules should reflect a strong policy favoring arbitration." 15B Charles A. Wright *et al.*, *Federal Practice & Procedure*, § 3914.17, at 9-10 (1992); *see* David D.

Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at 238 (Supp. 1992).

In dismissing Petitioners' appeal for want of jurisdiction, the court of appeals refused to review an order of the district court that, in reality, has not only subjected Petitioners to the costs and expenses of litigation, but also has purposefully eliminated the very "saving" which Congress intended to protect when it expressly permitted an interlocutory appeal of an order "refusing a stay of any action under section 3." 9 U.S.C. § 16(a)(1)(A).

Congress deliberately structured § 16 to ensure that a party entitled to an arbitral forum would not be wrongfully ordered to participate in the burdens incident to the trial and the litigation process:

> This section [16] permits arbitration to proceed without appeal if the district court orders that arbitration precede litigation, and by permitting immediate appeal if the district court orders that litigation precede arbitration. Denial of appeal when arbitration is given precedence should not often be costly: district courts usually will be correct, and the arbitration process is apt to produce considerable savings in the process of preparing for trial if the dispute is ultimately found nonarbitrable. If the dispute is found to be arbitrable, of course, great saving will be made.

Committee on the Judiciary, Section by Section Analysis on S 1482, 100th Cong., 2d Sess., 134 Cong. Rec. S16284, S16309, Oct. 14, 1988; *see Arnold*, 920 F.2d at 1274. Indeed, the policy favoring arbitration itself resulted from an "acknowledgement . . . that arbitration is a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy associated with arbitration." Siegel, *supra*, at 238; 15B Wright *et al.*, *supra*, § 3914.17, at 10.

Despite the literal terms of the order of the district court (i.e., "the motion of the [Petitioners] to stay proceedings pending arbitration [is] granted", Pet. App. 17a), Petitioners are being

subjected to the very expenses and formalities that arbitration was designed to avoid. *Compare* App. Pet. 24a ("We rule therefore that in the event [the court] orders a stay of proceedings between [Respondent] IIC and the [Petitioners] pending arbitration, discovery against the [Petitioners] shall nevertheless proceed as provided in the rules applicable to parties.") *with Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983) ("Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.").

Moreover, the Seventh Circuit's conclusion that the partial stay complied with the stay of the "trial" required by § 3 ignored the different language in § 16(a)(1)(A) authorizing an immediate appeal from an order "refusing a stay of *any action* under section 3." 9 U.S.C. § 16(a)(1)(A) (emphasis added). The broader language of § 16 reflects a Congressional intent to expand the circumstances when an appeal can be taken as of right where a district court refuses to stay an *action* under § 3 and thereby effectively fails to give precedence to a right to arbitration. See Committee on the Judiciary, Section by Section Analysis on S 1482, *supra*, S16309, Oct. 14, 1988; 15B Wright *et al.*, *supra*, § 3914.17.

The dismissal of the appeal by the Seventh Circuit seriously undermines the intent of Congress to permit immediate interlocutory appeals of orders that do not effectively give precedence to arbitration.

POINT II

A PARTY INVOKING ITS RIGHT TO AN ARBITRAL FORUM IS IMMUNE FROM ALL THE BURDENS OF TRIAL AND PRE-TRIAL PROCEEDINGS. AN ORDER DENYING THAT IMMUNITY IS A COLLATERAL ORDER THAT CAN BE IMMEDIATELY APPEALED.

The district court order is one of those " 'small class' of pre-judgment orders which 'finally determine claims of right separable from, and collateral to, rights asserted in the action, [and are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' " *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430 (1985).

In *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500 (1989), the Court reaffirmed its earlier decisions that an interlocutory order denying a claim to an "immunity from suit" may be appealed as a collateral final order. In determining whether the immunity asserted is the type to which an immediate appeal attaches "[t]he critical question, following *Mitchell*, is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988).

In holding that the denial of a motion to dismiss based on a contractual forum selection clause did not involve an immunity from suit, the Court distinguished between "an entitlement to avoid suit" and "an entitlement to be sued only in a particular forum." *Lauro Lines, S.R.L.*, 490 U.S. at 501. A careful examination of the nature of the right asserted by Petitioners under § 3 of the Federal Arbitration Act, required by *Van Cauwenberghe*, 486 U.S. at 525, compels the conclusion that "an essential aspect of the claim is the right to be free of the burdens of a trial."

Unlike the forum selection clause asserted by petitioner in *Lauro Lines, S.R.L.*, and the principle of specialty at issue in *Van Cauwenberghe*, the right provided by § 3 is not merely a "right not to be tried in a particular court." *Lauro Lines, S.R.L.*,

490 U.S. at 503 (Scalia, J., concurring), but an absolute prohibition and entitlement to avoid suit in any court of the claims made against Petitioners by Respondent IIC. *See also Moses H. Cone Memorial Hosp.*, 460 U.S. at 22 (Congress' intent in enacting the Federal Arbitration Act was to move the parties out of court). A stay of the trial required by § 3 of the Federal Arbitration Act, therefore, must necessarily include as "an essential aspect . . . the right to be free of the burdens of a trial" in the context of collateral order jurisprudence. *Van Cauwenberghe*, 486 U.S. at 525. And an order denying the incidents of that right must also be immediately appealable. Otherwise, from a practical and pragmatic standpoint, a mere stay of the "trial" is of limited value in the context of the litigation process.[3]

The district court's order refusing a stay of pre-trial proceedings against the Petitioners, therefore, is immediately appealable if it otherwise satisfies the three requirements of the collateral order doctrine:

> "[The order] must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.' "

Lauro Lines S.R.L., 490 U.S. at 498, *quoting Richardson-Merrell*, 472 U.S. at 431.

As to the first requirement, the district court's order conclusively, but incorrectly, determined the extent of the stay required by § 3 of the Federal Arbitration Act, i.e., the Petitioners are subject to pre-trial proceedings notwithstanding that all claims made by Respondent IIC against them are referable to arbitration. There was nothing tentative about the order and nothing further remains to be done to implement the order.

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3 The stay entered by the district court has relegated Petitioners to a state of limbo from which they can never emerge. Because all the claims against Petitioners have been referred to arbitration, Petitioners cannot even attempt to shorten the time that they must participate in the litigation.

Since the determination by the district court of the scope of the stay required by § 3 of the Federal Arbitration Act is completely separate not only from the merits of the action pending in the district court, but also from the merits of the arbitrable dispute between Respondent IIC and the Petitioners, the collateral order doctrine's second requirement is also satisfied. Moreover, and in view of the strong federal policy favoring arbitration, the district court's refusal to enforce the arbitration agreement raises an issue too important and too costly to await review at some future time.

Finally, the district court's order satisfies "the third prong of the collateral order test, [because it] turns on the precise contours of the right asserted, and not upon the likelihood of eventual success on the merits." *Lauro Lines S.R.L.*, 490 U.S. at 501. Indeed, the grounds for reviewing any arbitration award that might be made against the Petitioners are limited, *see* 9 U.S.C. § 10 (1988), but in any event cannot implicate the propriety of subjecting the Petitioners to pre-trial proceedings in the district court. In fact, no final judgment will *ever* be entered against the Petitioners in the court below except, perhaps, with respect to the confirmation of an arbitration award. *See* 9 U.S.C. § 9 (1988). Thus, no appeal from any such final judgment will involve either the district court's refusal to fully enforce the arbitration agreement or the extent of the stay required by § 3 of the Federal Arbitration Act.

The right Congress provided in § 3 of the Federal Arbitration Act for a stay of the trial, therefore, is a "right not to be tried in the sense relevant to the *Cohen* exception rest[ing] upon an explicit statutory . . . guarantee that trial will not occur." *Midland Asphalt Corp.*, 489 U.S. at 801; *see Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc.*, 546 F.2d 1107, 1112 (2d Cir. 1977) (upholding immediate appeal to protect right gained through contract's arbitration provisions on the same basis that permits an immediate appeal based on double jeopardy grounds); *cf. Taylor v. Nelson*, 788 F.2d 220, 224-25 (4th Cir. 1986) ("If we now have jurisdiction to hear the appeal from the vacatur, however, we are able to preserve Nelson's contractual

rights to arbitration and to be free from further proceedings, rights whose loss would be effectively unreviewable if our decision were delayed. The district court's vacatur therefore can be properly appealed under the *Cohen* doctrine.").

Since the district court order compels Petitioners to participate as parties in all the pending and future pre-trial proceedings, the district court has in effect denied Petitioners their absolute right to be immune from a civil trial. The order of the district court is appealable, therefore, under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

POINT III

THE DISMISSAL OF THE APPEAL BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND THREE COURTS OF APPEALS.

The Court has acknowledged that parties entering into an agreement providing for arbitration do so with the expectation that arbitration is likely to reduce the time and expense involved to resolve a dispute that may arise under the agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). It would be anomalous, therefore, if a partial stay of proceedings merely staying the trial while ordering the party invoking the arbitration clause to fully participate in pre-trial proceedings could under any circumstances satisfy the shared expectations of the parties to proceed solely in an arbitral forum.

Accordingly, the Court has consistently recognized that § 3 of the Federal Arbitration Act requires a stay of the proceedings and not just a stay of the "trial." *E.g. Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("The [Federal Arbitration] Act also provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement, § 3"); *Prima Paint Corp. v. Flood*

& Conklin Mfg. Co., 388 U.S. 395, 400 (1967) ("Section 3 requires a federal court in which suit has been brought 'upon any issue referable to arbitration under an agreement in writing for such arbitration' to stay the court action pending arbitration. . . ."). Indeed, the stay required by § 3 effectuates one of the fundamental purposes of enforcing an arbitration agreement; that of avoiding the formalities and procedural requirements associated with a lawsuit. *See Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."); *Mitsubishi Motors Corp.*, 473 U.S. at 633.

In other contexts, the Court has held that an incident of the right to avoid "trial" is the right to avoid all pre-trial proceedings, including discovery obligations. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), *citing Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) ("*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation"). In *Mitchell*, 472 U.S. at 526, the Court recognized that when a party is entitled to avoid a trial the party is also entitled to avoid "all the other burdens of litigation," including pre-trial proceedings and discovery obligations.

Three courts of appeals have also squarely held that under § 3 of the Federal Arbitration Act a party invoking the right to an arbitral forum is entitled to a stay of all pre-trial proceedings, including discovery obligations. *Corpman v. Prudential-Bache Securities, Inc.*, 907 F.2d 29, 31 (3d Cir. 1990) ("Where an action has been stayed pending arbitration, a district court may not permit the parties to conduct discovery under the Federal Rules of Civil Procedure."); *Suarez-Valdez v. Shearson Lehman/American Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988) (the Eleventh Circuit granted a writ of mandamus and held that the district court erred in refusing to stay pre-trial discovery pending arbitration, stating that "[a]n agreement to arbitrate is an agreement to proceed under arbitration and not under

court rules."); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 498 (5th Cir. 1986) ("A party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law."). The dismissal of the appeal for lack of appellate jurisdiction directly conflicts with those decisions.

Finally, in ordering the Petitioners to participate in pre-trial proceedings and give discovery as parties, the district court employed a rationale that specifically has been rejected by the Court in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

The district court evoked efficiency and economy concerns and rationalized that the Petitioners were not entitled to the stay of pre-trial proceedings ordinarily granted with a stay pending arbitration because the "dispute between [Respondent] IIC and [Petitioners] is not the entire suit; it is appended to a dispute between [Respondent] IIC and [Respondent] reinsurers, which neither of them is required to arbitrate." App. Pet. 22a. The district court then found that the mere pendency of those non-arbitrable claims rendered inapplicable the protections of the Federal Arbitration Act *vis-a-vis* Petitioners because "[t]he valid reasons for limiting or prohibiting discovery when arbitration proceedings are pending do not apply with respect to the [Respondent] reinsurers, and so the [Petitioners] have not made the showing that would justify . . . limiting discovery to that available against non-parties." App. Pet. 24a.

The logic employed by the district court, however, permits any party "to ignore the contract and resort to the courts", *Southland Corp.*, 465 U.S. at 7, by merely joining as a party one with whom no arbitration agreement exists.

The Court held in *Dean Witter*, however, that the pendency of non-arbitrable claims and arbitrable claims against the *same* party was an insufficient reason to ignore the mandate of the Federal Arbitration Act requiring a stay of the arbitrable claims. *A fortiori*, the pendency of non-arbitrable claims against a *different* party is wholly inadequate to eliminate one of the primary benefits of arbitration that Petitioners are enti-

tled to; namely, the avoidance of the costly burdens of civil litigation. *See Dean Witter*, 470 U.S. at 221.[4] Moreover, permitting discovery against Petitioners as parties conflicts in principle with *Dean Witter*. *See also Moses H. Cone Memorial Hosp.*, 460 U.S. at 20 ("[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."); *cf. Mitsubishi Motors Corp.*, 473 U.S. at 623 ("[T]he court [of appeals] directed the District Court to consider in the first instance how the parallel judicial and arbitral proceedings should go forward."); *Acevedo Maldonado v. PPG Industries, Inc.*, 514 F.2d 614, 617 (1st Cir. 1975) ("If a claim of right to arbitration could be foreclosed whenever a dispute between the parties to the contract derives from another person's claim against one of the parties, the utility of broad arbitration agreements would be undermined.").

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4 In *Dean Witter*, 470 U.S. at 219, the Court rejected the doctrine of "intertwining" used by some courts to avoid granting a stay under § 3, which was based on an argument that the "goal of speedy and efficient decisionmaking is thwarted by bifurcated proceedings, and that, given the absence of clear direction on this point, the intent of Congress in passing the Act controls and compels a refusal to compel arbitration" when arbitral and non-arbitral claims are pending against the same party.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Seventh Circuit dismissing Petitioners' appeal for want of jurisdiction.

Respectfully submitted,

PETER HOENIG*
LAWRENCE MENTZ
Counsel for Petitioners
BIEDERMANN, HOENIG, MASSAMILLO & RUFF
733 Third Avenue
New York, New York 10017
(212) 697-6555

**Counsel of Record*

Of Counsel:

LAWRENCE KLEIN
ALICIA M. GRACE
RANFI R. RIVERA

December 24, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 92-2530
September 30, 1992

No. 88 C 9838
George W. Lindberg, Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

INTERNATIONAL INSURANCE COMPANY,

Plaintiff-Third/Party Plaintiff-Appellee,

—v.—

CERTAIN UNDERWRITERS AT LLOYDS' LONDON, DOMINION INSURANCE COMPANY, LIMITED, HANNOVER REINSURANCE COMPANY, et al.,

Defendants,

—and—

CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, et al.,

Third/Party Defendants-Appellants.

Before:

HON. JOHN L. COFFEY, *Circuit Judge*
HON. JOEL M. FLAUM, *Circuit Judge*
HON. KENNETH F. RIPPLE, *Circuit Judge*

This matter comes before the court for its consideration of the following documents:

1. PLAINTIFF-APPELLEE INTERNATIONAL INSURANCE COMPANY'S MOTION TO DISMISS THE APPEAL filed herein on 7/16/92, by counsel.

2. DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS filed herein on 7/28/92, by counsel.

On consideration thereof,

IT IS ORDERED that the Motion to Dismiss is GRANTED and this appeal is DISMISSED for lack of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 9838

Judge Lindberg
Magistrate Judge Weisberg

INTERNATIONAL INSURANCE COMPANY,

Plaintiff,

—v.—

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,

Defendants.

KEITH KERR, *et al.*,

Counter-plaintiffs,

—v.—

INTERNATIONAL INSURANCE COMPANY,

Counter-defendant.

INTERNATIONAL INSURANCE COMPANY,

Counter-defendant/Third-party plaintiff,

—v.—

SOCIETE COMMERCIALE DE REASSURANCE S.A., *et al.*,

Third-party defendants.

Magistrate Judge's Report and Recommendation on Clarkson Defendants' Motion to Stay Pending Arbitration

This suit arose from the attempt of an insurer, International Insurance Company (IIC), to compel certain reinsurers to reimburse it for payments made in settlement of an insurance claim brought by SmithKline Beckman (SKB) under an environmental impairment liability (EIL) policy issued by IIC. The defendant reinsurers have counterclaimed against IIC, claiming it breached implied covenants in its reinsurance treaties with them, induced them to participate in the reinsurance program through fraudulent misrepresentations, and mishandled the SKB claim. The counterclaim also alleges that IIC and others committed acts of racketeering subjecting IIC to liability under the Racketeer Influenced and Corrupt Organizations Act (RICO).

IIC insists that it was only the nominal insurer, "fronting" for an international pool of reinsurers who sought to compete in the U.S. EIL market and were to assume virtually the entire risk. IIC has filed a third-party complaint against an alleged organizer of the pool, Societe Commerciale de Reassurance S.Â. (SCOR), a French corporation, and the alleged pool manager, four U.K. corporations which the third-party complaint refers to without differentiation as "Clarkson." The corporations are The Clarkson Puckle Group, Ltd. (CPG), ERAS (International), Ltd. [standing for Environmental Risk Assessment Service] (ERAS), Clarkson Puckle International Reinsurances, Ltd. (CPIR) and Bain Clarkson, Ltd. (BC). IIC alleges that they "acted without respecting their separate corporate identities." Third-Party Complaint ¶ 3. IIC also filed a Second Amended and Supplemental Complaint (Complaint) in which it makes direct claims against Clarkson and SCOR.

IIC's relationship with the EIL pool is reflected in two agreements with CPG (the Agency-Company Agreements or A-C Agreements) which appointed CPG as IIC's agent with respect to soliciting business, collecting premiums, processing claims and procuring reinsurance. The first A-C Agreement

was dated November 4, 1982 and the second was dated January 1, 1983. Third-Party Complaint Exhs. A,B. The heading of the second A-C Agreement states that it "replaces" the first. We understand this to mean that the second A-C Agreement was to govern the parties' relationship after January 1, 1983. Thus the provisions regarding indemnification and dispute resolution found in the second A-C Agreement are to control in disputes arising after January, [sic] 1, 1983 even if based on transactions originally governed by the first A-C Agreement. Since these are the provisions in question here, we will use "Agreement" to mean the second A-C Agreement unless otherwise indicated.

In Art. VIII of the Agreement, CPG agreed to defend and indemnify IIC against any "claims or liabilities based on any actual or alleged bad faith or negligence of the Agent [CPG] when such bad faith or negligence arises out of or is alleged to have arisen out of the processing or handling of business under this Agreement or any actual or any alleged failure of the Agent to comply with the terms and conditions of this Agreement."[1] Both A-C Agreements have provisions requiring arbitration of disputes.

In Count I of the Third-Party Complaint IIC seeks indemnification from Clarkson under the A-C Agreements for any judgment against it on the counterclaim for conduct attributable to Clarkson's negligence, bad faith or errors in the processing or handling of business under the A-C Agreements. Count II alleges that Clarkson was acting as an agent of SCOR, rendering SCOR also liable for the foregoing. In Count III IIC seeks indemnification from SCOR under a March 11, 1988 claims handling agreement in which SCOR agreed to hold IIC harmless with respect to SCOR's handling

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1 In the first A-C Agreement CPG agreed to indemnify IIC against "any claims or liabilities the Company [IIC] may become obligated to pay based on any actual or alleged error of the Agent [CPG] in the processing or handling of business placed under this Agreement or on any actual or alleged failure of the Agent to comply with the terms and conditions of this Agreement." While the first Agreement only requires CPG to indemnify IIC after IIC becomes obligated to a third person, the second requires CPG to *defend* IIC prior to a finding of liability.

of claims thereunder. IIC also seeks reimbursement of defense costs from Clarkson and SCOR.

In its direct claims against Clarkson in the Complaint, IIC seeks indemnification under the Agreement (Count XI). IIC alleges that Clarkson breached its promise in the Agreement to provide reinsurance for IIC on certain terms and conditions (Count XII) and that it breached its fiduciary duty as IIC's agent in failing to disclose material information regarding the EIL program (Count XIII).

The Clarkson defendants have moved the court to stay proceedings against them, invoking the arbitration provisions in the A-C Agreements.[2] In briefing this motion the parties have not distinguished among the Clarkson entities named as defendants, and for the purposes of this motion we will not do so either. The motion has been referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).[3]

The Federal and Illinois Arbitration Acts

The Federal Arbitration Act (FAA) was originally enacted in 1925 and now constitutes Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements at English common law and in American courts, and to place arbitration agreements upon the same footing as other contracts. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985). Its primary substantive provision states that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable,

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2 CPIR and BC moved for a stay in the alternative in the event their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction is denied. Their Rule 12(b)(2) motion was subsequently withdrawn as to BC and has been stayed pending discovery as to CPIR.

3 Because a stay pending arbitration is considered final for purposes of appeal, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 8-13 (1983), this is a dispositive motion even though it does not correspond to any of the exceptions listed in 28 U.S.C. § 636(b)(1)(A).

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4. These provisions manifest a "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. Clarkson invokes § 3 of the FAA:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

This language is unequivocal and "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" a court has no discretion and must refer the matter to arbitration. *Morrie Mages and Shirlee Mages Foundation v. Thrifty Corp.*, 916 F.2d 402, 406 (7th Cir. 1990). The FAA requires a stay and a referral to arbitration when there are *issues* subject to arbitration, whether or not all parties to the pending suit are obliged to arbitrate. *Id.* at 406-07.

Illinois law is also applicable because the Agreement calls for the application of the law of the state in which ICC's headquarters is located, *i.e.*, Illinois. Where the agreement to arbitrate calls for the application of state law, a federal court should apply it unless it is inconsistent with the goals and policies of the FAA. *Volt Information Sciences v. Stanford University*, 489 U.S. 468, 478-79 (1989). The Illinois Uniform Arbitration Act, Ill. Rev. Stat. ch. 10 ¶ 101 *et seq.*, (1989) is similar to the FAA, and Illinois cases interpreting it have also

followed a policy of favoring arbitration. For the purposes of the present motion, we see no significant difference between federal and Illinois law.

Is Arbitration Optional?

IIC does not contest the validity or the enforceability of the agreement to arbitrate, nor does it attempt to separate the issues in this case into those that are properly referable to arbitration and those that are not. IIC argues that the unique arbitration provisions in the Agreement make arbitration optional rather than mandatory and that Clarkson has waived its right to arbitration by instituting litigation against IIC in London.

If arbitration is optional the court should not order it. As the Supreme Court has put it, "[the FAA] does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement'.*" *Volt Information Sciences*, 489 U.S. 474-75 (emphasis in original). The arbitration provisions of the Agreement read in pertinent part:

> XI. *ARBITRATION*
>
> A. All disagreements which may arise under this Agreement between the parties hereto shall be referred to the decision of a Board of Arbitration, consisting (except as hereinafter provided) of two Arbitrators, one to be nominated by the Company and one by the Agent and an Umpire to be chosen by the Arbitrators . . . .
>
> B. Arbitration will be commenced by a written request from one party to the other to nominate an Arbitrator, and should either party fail to do so within thirty days of the receipt of such a request, then the nominee or [sic; probably should be *of*] the other party will constitute the Board of Arbitration without any Umpire.

C. The hearing of the Arbitration will take place, in such place as agreed upon, . . . pursuant to the laws of state [sic] in which the Company's Headquarters are located which govern such arbitration. The Arbitrators will act at the earliest convenient date and will submit to the Umpire only such questions upon which they disagree. A decision in writing of any two Arbitrators, when filed with the Company and the Agent, will be final and binding on the parties.

* * * *

XII. *SERVICE OF SUIT CLAUSE*

In the event that any dispute cannot be resolved to the satisfaction of either party by the foregoing arbitration procedure, the Agent, at the request of the Company, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

Third Party Complaint Exh. B at 2-3.

IIC contends that Art. XII renders arbitration optional. The language is unusual, but a court should proceed on the assumption that the contracting parties intended a consistent agreement and give effect to all of its terms if possible.

The Agreement states that disputes "shall" be arbitrated. It also states that a decision of the arbitrators will be final and binding on the parties. It further states that if one party declines to nominate an arbitrator, the other party's nominee may proceed to decide the case. These are all inconsistent with a construction holding that either party has the right to decline arbitration.

But what are we to make of Art. XII? In the event that any dispute cannot be resolved to the satisfaction of either party by arbitration, Clarkson agrees to submit to the jurisdiction of a United States court and "and all matters arising

hereunder shall be determined in accordance with the law and practice of such Court." Does this mean that if one of the parties is dissatisfied, the court shall try the issues *de novo*? Even if this were the case, it would not be grounds for denying Clarkson's motion, since the Agreement at least requires the parties to attempt arbitration first.

We reject IIC's interpretation since it would be contrary to the concept of arbitration itself. The parties agreed on arbitration; arbitration is a familiar concept and we may presume the parties knew what it means. Unlike mediation, arbitration is a private adjudication, a binding determination by a third person; an arbitration in which either party is free to reject the award is not an arbitration.

It is more reasonable to suppose that in agreeing that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" the parties meant that if either party was dissatisfied it could petition the court for review, and the court would then confirm, modify or set aside the award in accordance with applicable law. Art. XII merely established that IIC could choose which court. The heading of this paragraph, "Service of Suit Clause," supports this interpretation of the provision as essentially a consent to jurisdiction. We conclude that arbitration is not optional and this objection to Clarkson's motion must fall.

Has Clarkson Waived its Right to Arbitration?

Like other contractual rights, the right to demand arbitration of disputes can be waived. Given the strong state and federal policy favoring arbitration, waiver will not lightly be inferred. *Mages*, 916 F.2d at 405; *Edward Electric Co. v. Automation, Inc.*, 164 Ill App. 3d 547, 115 Ill. Dec. 647, 652, 518 N.E.2d 172, 177 (1st Dist. 1988). In *TDE Ltd. v. Israel*, 185 Ill App. 3d 1059, 133 Ill. Dec. 843, 848, 541 N.E.2d 1281, 1286 (1st Dist. 1989), the court stated that "[w]aiver of a contractual right to arbitration occurs when a party's conduct is so inconsistent with the arbitration clause as to demonstrate abandonment of that right." See also *Mages*, 916 F.2d at 405 (the crucial question is whether under

the circumstances the defendant acted inconsistently with the arbitration right; prejudice suffered *by the objecting party* should be considered).

IIC says that Clarkson waived its right to insist on arbitration by naming it and its agent and affiliate The London Agency, Inc. (TLA) as third-party defendants in certain suits pending in London relating to the EIL reinsurance program. Clarkson replies that these suits (a) did not involve claims based on the A-C Agreements and thus were not waivers of their arbitration provisions; (b) were filed only to protect Clarkson against the running of the statute of limitations; and (c) have caused IIC no prejudice. Both parties have submitted documents filed in the London litigation. Since waiver is, in effect, an affirmative defense to a *prima facie* obligation to arbitrate, the arguments and affidavits offered on this issue commence with IIC's brief in opposition to the motion, to which Clarkson responded in its reply brief and in the affidavit (with exhibits) of its solicitor, Wiliam Munro Rodger, dated July 18, 1991 (cited as Rodger Opp. Aff.). As a consequence, IIC did not have (and did not seek) an opportunity to reply to Clarkson's response.

On the first issue, whether Clarkson's claims in the London litigation arose under the Agreement, both sides are correct. Clarkson originally stated that its claims against IIC arose, at least in part, from the A-C Agreements and were thus presumptively arbitrable. Nevertheless, as discussed below, Clarkson later dropped its reliance on the A-C Agreements and we find that its claims do not in fact arise under them.

A Writ of Summons dated February 3, 1989 and issued against TLA states that various Clarkson entities (including the third-party defendants here) have brought suit against TLA for

> Damages for breach of contract and/or negligence and/or breach of duty arising out of written and/or oral contracts made in or about November 1982 and/or January 1983 and/or 1st October 1983 in respect of the operation and/or management of an environmental impairment

> liability risks programme and/or reinsurance pool of environmental impairment liability risks, including, without limitation, the promotion, underwriting, claims handling and retrocession of such programme.

1989 Folio 233 Q.B.Division, Commercial Court, IIC Br. Exh. A. IIC points to the November 1982 and January 1983 dates, corresponding to the A-C Agreements, and Clarkson acknowledges that the A-C Agreements were meant. Rodger Opp. Aff. ¶ 4.

However, Clarkson's Points of Claim (corresponding to the complaint in our procedure) dated April 11, 1990, Rodger Opp. Aff. Exh. A, make it clear that its claims do not arise under the A-C Agreements, but from a separate claims handling agreement entered into in September 1983. This is consistent with IIC Br. Exh. B, an affidavit of Mr. Rodger as solicitor for "the Clarkson defendants,"[4] filed in another London suit designated 1987 Folio 791, in which Clarkson seeks leave to add a claim against TLA. Rodger makes apparent reference to the foregoing Writ of Summons, and states that at the time it was filed he had no evidence of a contract between Clarkson and TLA. He then states that in November 1989 he became aware of such a contract. He states that on or about September 1, 1983 TLA undertook for Clarkson to handle all claims against IIC arising out of the EIL insurance program. This claims handling function had previously been performed by Alexander Howden Insurance Services (AHIS), and it was agreed that TLA would receive the same compensation as had been paid to AHIS.

The "Amended Third Party Notice" dated July 3, 1990 and amended October 12, 1990, issued in a suit designated as 1988 Folio No. 1722 between SCOR as plaintiff and eleven Clarkson affiliates as defendants, IIC Br. Exh. C, which adds IIC as an additional third-party defendant, also refers to an alleged oral agreement made in September 1983 between

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4 It is not clear which entities are referred to by Mr. Rodger as "the Clarkson defendants." We will refer to them as "Clarkson" here with the understanding that the word may not denote the same entities as the parties to this suit.

some or all of the Clarkson Defendants and IIC. The Notice states that Clarkson complains that IIC breached a September 1983 EIL claims handling agreement, was negligent in handling EIL claims in 1982 and 1984 and breached duties of good faith, skill, diligence and care with respect to the handling of claims and the underwriting of risks, all for the "1982 to 1984 years of reinsurance in the environmental impairment liability reinsurance programme."

Although IIC disputes the existence of this agreement, IIC Br. at 5, the materials it has provided are consistent with Clarkson's position that the claims against IIC and TLA arose out of a separate agreement between TLA and Clarkson. They are also consistent with the statement by Clarkson's counsel, Mr. Rodger, that Clarkson regarded TLA and IIC as separate entities, and entered into the oral claims handling agreement with TLA as principal. According to Rodger, Clarkson only sought to join IIC after IIC's counsel declared that TLA had been acting solely as IIC's agent. See Rodger Opp. Aff. ¶¶ 6-8. Clarkson's position is also supported by ¶ 21 of an affidavit of *TLA's* counsel, David Alastair Fraser, in the London litigation dated April 12, 1990, Rodger Opp. Aff. Exh. D, referring to a written agreement dated October 6, 1983 between AHIS and TLA, *id.* Exh. C, providing for the transferring of claims handling responsibility from AHIS to TLA. Finally, Mr. Justice Waller of the Commercial Court held that Clarkson had a "good arguable case" against TLA and IIC based on this alleged contract. See Rodgers Opp. Aff. Exh. F at 27-29.

It is reasonably clear that in the London litigation Clarkson is not alleging that IIC breached duties under the A-C Agreements, but is alleging a breach of a subsequent agreement by which TLA undertook claims handling that had been the responsibility of Clarkson or its designee, AHIS. Although in the "Amended Third Party Notice" IIC is named as a defendant, liability appears to be predicated solely on the acts of IIC's alleged agent, TLA, which had no role under the A-C Agreements. See also Rodger Aff. dated [illegible] June, 1990, IIC Br. Exh. D at ¶¶ 6,7; Rodger Aff. dated July 25, 1990, IIC Br. Exh. E at ¶¶ 12-15.

IIC argues that even if Clarkson delegated claims handling to TLA in a separate contract, any dispute between Clarkson and TLA would still be subject to the arbitration provisions of the Agreement because the delegation was of claims handling duties which Clarkson had under the A-C Agreements and concerned the subject matter of those agreements. IIC may be correct. However, we need not decide that question in order to determine whether a waiver has occurred; the question is whether Clarkson's actions are inconsistent with an intention to arbitrate. If Clarkson can show that the claims it asserted in the London litigation were arguably not arbitrable, we should be reluctant to find a waiver when the claims IIC has asserted here clearly *are* arbitrable.[5]

IIC cites *Consumer Concepts, Inc. v. Mego Corp.*, 458 F.Supp. 543 (S.D.N.Y. 1978), in which a licensee and licensor had an umbrella agreement providing that the licensor would offer the licensee ideas for toys; if the licensee accepted an idea it would be incorporated into their agreement. The agreement contained a broad arbitration clause that provided that "[a]ny controversy or claim arising out of or relating to this agreement or the breach thereof, shall be settled by arbitration." *Id.* at 544. The parties entered into a separate confidentiality agreement in connection with their negotiation concerning an idea for a particular toy in which the licensee agreed that if no agreement was reached by November, 1975 it would not disclose the idea or make toys based on it until 1979.

The licensor sued for an alleged breach of the second agreement, and the licensee demanded arbitration. The court ordered a stay pending arbitration, although the second confidentiality agreement had no arbitration provision, because it found the second agreement supplemented the master agreement and could not be read apart from it. *Id.* at 545.

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5 We emphasize that these conclusions are made upon limited evidence and in part rest on IIC's heavy burden of showing waiver. IIC is free to claim in the London proceedings that its dispute with Clarkson there is arbitrable, and any determination made by this court in deciding this motion to stay should not be deemed to make that issue *res judicata*.

The situation here is quite different. The A-C Agreement requires only arbitration of "disagreements which may arise under this Agreement," in contrast to the first A-C Agreement which required arbitration of "[a]ny controversy or disagreement arising out of or relating to this Agency-Company Agreement or transactions contemplated hereby." Because the two A-C Agreements are dated only two months apart, the parties would have been fully aware of the provisions of the first when they replaced it with the second, and we read this as an intentional narrowing of the scope of the arbitration provision. Arguably the transfer of claims handling responsibility to TLA was "related to" the Agreement (although it does not appear to be "contemplated by" it), but a dispute relating to such a transfer does not, we believe, arise "under" the Agreement and hence is not covered by the arbitration provision of the Agreement.

Further, the delegation of claims handling responsibility to TLA was not part of the dealing between the parties anticipated by the Agreement, unlike *Consumer Concepts*. Under the Agreement Clarkson (ERAS) could delegate its claims handling obligations with IIC's consent, but there is no reference in the Agreement to TLA or IIC's assuming them. At the time it entered into the Agreement and thereafter Clarkson apparently delegated them to AHIS, an unrelated party, which is consistent with our conclusion that claims handling by TLA was not contemplated by the A-C Agreements.

In the London suits, Clarkson alleges that TLA took over the claims handling function with respect to claims against IIC's policies on the same terms as AHIS.[6] IIC has offered no reason to suppose that because TLA was an affiliate of

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6 IIC alleges that Clarkson has ignored an arbitration agreement with Howden, by which it apparently means AHIS. IIC Br. at 6, n.3. However, even if TLA somehow assumed AHIS's claims handling agreement with Clarkson and thereby became obligated to arbitrate disputes arising thereunder, this obligation would not arise under the A-C Agreements. IIC has offered no authority for the proposition that refusal to arbitrate disputes arising under one agreement is a waiver of the right to compel arbitration under another one.

IIC, when Clarkson contracted with TLA its agreement automatically incorporated a promise made by IIC to arbitrate its disputes with Clarkson. TLA and IIC are separate legal entities. Why should this second contract have incorporated the arbitration provisions of the A-C Agreement if it was the same arrangement Clarkson had with AHIS, which was not a party to the A-C Agreement? Clarkson has convincingly demonstrated that the claims it asserted against IIC in the London litigation arose from a claims handling agreement which contained no agreement to arbitrate. IIC, which has the burden of showing waiver, has not shown that the arbitration provisions of the A-C Agreement apply to this second agreement.

Did Clarkson's initial reference to the Agreements in its February 3, 1989 Writ of Summons constitute an unambiguous election of litigation over arbitration even though it turns out that its claims are not arbitrable? We think not. As Clarkson has pointed out, the initial Writ was against TLA alone. While it is true that one cannot avoid arbitration by suing the agent of the party with whom one has agreed to arbitrate, Clarkson had reason to suppose that it was dealing with TLA as principal in entering into the claims-handling agreement, even though it surely knew that TLA and IIC were affiliated entities.[7] The claims handling agreement applied to IIC's policies written pursuant to the A-C Agreements, and the authority to delegate claims handling responsibilities to TLA also came from the A-C Agreements, so mention of the A-C Agreements was not out of place in the Writ. But the language of the Writ, "breach of contract and/or negligence and/or breach of duty arising out of written and/or oral contracts . . ." is vague even by this country's pleading standards, and until TLA or IIC was served with the Points of Claim it would not know what specific claims

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7 Clarkson even now questions whether TLA was IIC's agent for purposes of claims handling, pointing to an Agency Agreement dated January 1, 1973 between IIC and TLA which authorizes TLA to bind coverage and accept premiums but is silent as to claims handling. Rodger Opp. Aff. Exh. E.

Clarkson was asserting, much less whether they were arbitrable.

Clarkson also says that the third-party claims were filed against TLA and IIC only to protect against the running of the statute of limitations. Clarkson Br. at 10-11; Rodger Opp. Aff. at ¶ 4. IIC has not responded to this contention. This is an element to be considered, although it has little significance in view of our finding that the claims Clarkson asserts in the London litigation are not arbitrable. A demand for arbitration would (probably) not toll the statute of limitations, and Clarkson should have the right to protect itself by filing suit and then asking for a stay pending arbitration. Presumably Clarkson determined that its claims did not arise under the A-C Agreements and did not ask for a stay.

Finally we come to the element of prejudice. Although prejudice is an element to be considered, we do not believe a showing of prejudice is an absolute requirement. *Midwest Window Systems v. AMCOR Industries, Inc.*, 630 F.2d 535, 537 (7th Cir. 1980), stated that all circumstances must be considered, and prejudice should be one of them, a position followed by *Mages*, 916 F.2d at 405. If we are correct that the claims made in the London litigation against IIC were not arbitrable, IIC suffered no prejudice from being sued.

After considering all of the circumstances, we conclude that IIC has not shown that Clarkson waived its right to have disputes arising under the Agreement resolved through arbitration.

Conclusion

We conclude that IIC's obligation to arbitrate disputes arising under the Agreement is not optional and that Clarkson has not waived its right to arbitrate. We accordingly recommend that the motion of the Clarkson defendants to stay proceedings pending arbitration be granted, and that the parties be ordered to proceed to arbitration in accordance with the arbitration provisions of the Agreement.

The parties are allowed 20 days from the date of service hereof to file written objections to this Report and Recom-

mendation with Judge Lindberg. 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 6(b). Failure to file such objections will normally waive the right to appeal the rulings set forth in this Report. *Egert v. Connecticut General Life Ins. Co.*. [sic] 900 F.2d 1032, 1039 (7th Cir. 1990).

Respectfully submitted,

/s/ Bernard Weisberg

Bernard Weisberg
United States Magistrate Judge

Date: December 20, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 9838

Judge Lindberg
Magistrate Judge Weisberg

INTERNATIONAL INSURANCE COMPANY,
Plaintiff,

—v.—

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,
Defendants.

KEITH KERR, *et al.*,
Counter-plaintiffs,

—v.—

INTERNATIONAL INSURANCE COMPANY,
Counter-defendant.

INTERNATIONAL INSURANCE COMPANY,
Counter-defendant/Third-party plaintiff,

—v.—

SOCIETE COMMERCIALE DE REASSURANCE S.A., *et al.*,
Third-party defendants.

Magistrate Judge's Ruling on Motion of Clarkson Defendants For Protective Order and for an Extension of Time to Plead

Defendants and third-party defendants, The Clarkson Puckle Group, Ltd., ERAS (International), Ltd., Clarkson Puckle International Reinsurances, Ltd. and Bain Clarkson, Ltd. (collectively the Clarkson defendants), have moved for a stay of proceedings against them pending arbitration (the Arbitration Motion), and certain of them have also moved to dismiss for lack of personal jurisdiction. In connection with these motions the Clarkson defendants moved on June 10, 1991 for a protective order staying all discovery and extending their time to plead until the Arbitration Motion and motions to dismiss were decided. All of these motions were referred to this court for a ruling pursuant to 28 U.S.C. § 636(b)(1)(A).

While the last motion was briefing, on August 1, 1991 this court stayed discovery pending rulings on motions to dismiss, motions to stay pending arbitration, and determining whether the presence of the Lloyd's reinsurers destroyed federal diversity jurisdiction. This, in effect, granted the motion with respect to a stay of discovery pending ruling on the Arbitration Motion and certain Clarkson defendants' motion to dismiss. The motion for an extension of time to plead was unopposed and will be granted.

Our ruling would end here except that in their memoranda the parties argued an issue not raised in the motion itself, namely, what discovery obligations the Clarkson defendants should have in the event they proceed to arbitration with IIC. In their initial brief dated July 23, 1991 the Clarkson defendants took the position that arbitration might render their participation in the discovery process unnecessary. This was hotly disputed by both IIC and the reinsurers. In their reply, the Clarkson defendants then modified their position, stating that as to IIC they should only be required to give discovery to the extent ordered by the arbitrators under Section 7 of the Federal Arbitration Act, and as to the defendant reinsur-

ers discovery should proceed as if the Clarkson defendants were not parties.

This is a different motion from the one actually filed, which only addressed the period of time up to rulings on the Arbitration Motion and motions to dismiss. On December 20, 1991 the court entered its Report and Recommendation on the Arbitration Motion, recommending that it be granted and all claims by IIC against the Clarkson defendants be stayed pending arbitration. If this recommendation is adopted, the court will have to address the additional issue discussed in the briefs, although not raised in the motion. Only one of the Clarkson defendants, Bain Clarkson Ltd., continues to challenge personal jurisdiction, so there is no prospect that *none* of the Clarkson defendants will remain parties.

The court could defer ruling until after Judge Lindberg adopts or rejects the recommendation on the Arbitration Motion, or require a new motion and briefing. However, both IIC and the reinsurers submitted their briefs after the court's ruling of August 1, and recognized that the issue had become what Clarkson's discovery obligations should be if proceedings are stayed pending arbitration. Neither has sought to file a surreply. Accordingly we treat the motion as having been amended with the consent of the parties. Since a ruling on the motion can take effect immediately upon the entering of a stay pending arbitration (unless modified or set aside under Rule 72(a)), in the interest of saving time the court will rule on the motion now.

We begin by noting that at least three of the Clarkson defendants are parties to this action whether or not arbitration is ordered. As parties they have obligations under the Federal Rules to provide discovery. Under Rule 26(c) the court "for good cause shown" "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The burden of showing good cause is, of course, upon the moving party. *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 190 (N.D.Ill. 1985) (Getzendanner, J.).

The Clarkson defendants' original position, that their participation in discovery may be rendered wholly unnecessary if IIC's claims are ordered to arbitration, Clarkson Def. Br. at 4, is untenable. The reinsurers have filed a broad counterclaim against IIC, alleging, among other things, that IIC committed fraud, mismanaged claims, engaged in negligent underwriting, and breached its contractual duties. They allege that the Clarkson defendants, or some of them, were IIC's agents and material participants in the conduct complained of. The testimony of the Clarkson defendants' employees and records from their files will be essential to the adjudication of the counterclaim, which has not, of course, been referred to arbitration.

Furthermore, the Clarkson defendants may have evidence relevant to IIC's claims against the reinsurers, since one or more of them appears to have organized the reinsurance arrangement IIC seeks to enforce. What Clarkson told—or did not tell—the reinsurers will probably be material to the interpretation and enforceability of the reinsurance treaties. Thus, even if they were not parties, the Clarkson defendants would be subject to third party discovery, and even dismissal would not justify a complete stay of discovery as to them.

The Clarkson defendants raise the point that ordinarily discovery is stayed pending arbitration except as may be ordered by the arbitrators, and the court should permit discovery only in extraordinary circumstances. Having chosen arbitration, with its more limited discovery tools, they say, the parties should normally not be allowed to use the more expansive (and expensive) federal arsenal.

But here the dispute between IIC and the Clarkson defendants is not the entire suit; it is appended to a dispute between IIC and its reinsurers, which neither of them is required to arbitrate. Since at least some of the Clarkson defendants were key players in the EIL program, to limit IIC's discovery against the Clarkson defendants to what the arbitrators might allow would be fundamentally unfair for two reasons.

First, there is little or no discovery in arbitration. For the reasons stated in our Report and Recommendation on the

Arbitration Motion, the Illinois Uniform Arbitration Act, Ill. Rev. Stat. ch. 10 ¶ 101 *et seq.* (1989), rather than the Federal Arbitration Act, 9 U.S.C. § 101 *et seq.*, will govern the arbitration. The Illinois statute permits depositions to be taken only when a witness will not be available to testify at the hearing. Ill. Rev. Stat. ch. 10 ¶ 107. Second, the arbitrators might well take the position that they are empowered only to order discovery with respect to the dispute before them. This could leave IIC unable to obtain discovery with respect to much of its dispute with the reinsurers.

It might be possible to separate the issues with respect to which discovery is sought, and permit IIC only arbitrator—authorized discovery with respect to evidence relating to arbitrable issues. However, Rule 26(b)(1) is a very blunt knife to make such a division, and it takes little imagination to realize the likely consequences—disputes about the scope of discovery on both sides, and double depositions of witnesses. As with the proverbial judgment of Solomon, an attempt to divide the matter rationally would cause more serious problems, and neither party has asked for this solution.

Accordingly, we believe IIC should have the same scope of court—supervised discovery against the Clarkson defendants as the defendant reinsurers have. But what should that scope be? The Clarkson defendants ask to be treated as non-parties with respect to the reinsurers, since they have no claims against the Clarkson defendants and the Clarkson defendants' dispute with IIC is to be arbitrated.

The Clarkson defendants may be in this forum solely because of their agreements with IIC. While they (or some of them) agreed to this forum, they agreed that disputes would be arbitrated in the first instance, with the limited discovery obligation that implies. They did not agree to submit to document requests and interrogatories from the reinsurers, with whom they have (in this forum) no dispute at all.

Nevertheless, the arbitration agreements did not entitle the Clarkson defendants to reasonably expect to be shielded from discovery of evidence which is important to resolution of the dispute between IIC and the reinsurers. And since the Clarkson entities are parties, Rule 26(b)(1) gives the defen-

dant reinsurers the right to conduct discovery against the Clarkson defendants whether or not they have any claim against them, subject to the court's power to limit discovery for good cause shown. Clarkson has not shown "annoyance, embarrassment, oppression, or undue burden or expense." The valid reasons for limiting or prohibiting discovery when arbitration proceedings are pending do not apply with respect to the reinsurers, and so the Clarkson defendants have not made the showing that would justify the kind of order they seek, limiting discovery to that available against non-parties.

We rule therefore that in the event Judge Lindberg orders a stay of proceedings between IIC and the Clarkson defendants pending arbitration, discovery against the Clarkson defendants shall nevertheless proceed as provided in the rules applicable to parties. If a stay of proceedings is denied, this ruling will be moot since the same result will obtain. The foregoing is without prejudice to any authority the arbitrators may have to order discovery, or permit its use in the arbitration proceeding.

The Clarkson defendants are granted an extension of time to answer or otherwise plead until 20 days after either Judge Lindberg denies their motion for a stay pending arbitration or a final award of the arbitrators is served upon them.

Under Fed. R. Civ. Proc. 72(a) the parties have 10 days from date hereof to file written objections to this Report and Recommendation with Judge Lindberg. Failure to file such objections will normally waive the right to appeal the rulings set forth in this Report. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Respectfully submitted,

/s/ BERNARD WEISBERG

Bernard Weisberg
United States Magistrate Judge

Date: January 15, 1992

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Peter Hoenig
Biedermann, Hoenig, Massamillo & Ruff
733 Third Avenue – 18th Floor
New York, NY 10017

Case Number: 1:88-cv-09838

Title: International Ins v. Certain Underwriters

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 1/28/92 by Hon. Bernard Weisberg: Clarkson defendants' motion for protective order temporarily staying discovery pending a determination by the district court of Clarkson's objections to Magistrate Judge Weisberg's 01/15/92 ruling on their motion for protective order is denied. This order is stayed until 02/20/92. Mailed notice.

This order was entered on the docket by the Clerk February 7, 1992

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Peter Hoenig
Biedermann, Hoenig, Massamillo & Ruff
733 Third Avenue – 18th Floor
New York, NY 10017

Case Number: 1:88-cv-09838

Title: International Ins v. Certain Underwriters

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 2/12/92 by Hon. George W. Lindberg: denying third-party defendant Clarkson's motion for protective order [953-1]. Briefing schedule on objections to Magistrate Judge's 01/15/92 ruling is stayed to and including 02/26/92. Status hearing is set for 02/26/92 at 9:30 a.m. Mailed notice

This order was entered on the docket by the Clerk February 13, 1992

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Larry S. Kaplan
Adler, Kaplan & Begy
10 North Dearborn Street
4th floor
Chicago, IL 60602

Case Number: 1:88-cv-09838
Title: International Ins v. Certain Underwriters
Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 2/27/92 by Hon. George W. Lindberg: The Court's order of February 12, 1992 is clarified and amended as follows: Third party defendant Clarkson's objections to the report and recommendation of the Magistrate Judge of January 15, 1992 are overruled; Clarkson's motion for protective order against further discovery and a briefing schedule thereon are denied. Discovery as to Clarkson is stayed until March 13, 1992 pending appeal of this order to the Seventh Circuit. Mailed notice

This order was entered on the docket by the Clerk February 28, 1992

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 13, 1992

Before:

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 92-1478

IN THE MATTER OF:

CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL), LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, et al.,

Petitioners.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divison.

No. 88 C 9838
GEORGE W. LINDBERG, *Judge.*

This matter comes before the court for its consideration of the following documents:

1. "PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND THIRD-PARTY DEFENDANTS, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, AND BAIN CLARKSON, LIMITED" filed herein on

February 28, 1992, by counsel for defendants and third-party defendants-petitioners.

2. "RESPONSE OF PLAINTIFF/THIRD PARTY PLAINTIFF INTERNATIONAL INSURANCE COMPANY TO PETITION FOR WRIT OF MANDAMUS" filed herein on March 9, 1992, by counsel for International Insurance Company.

3. "RESPONSE OF DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S TO PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND THIRD-PARTY DEFENDANTS, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, AND BAIN CLARKSON, LIMITED" filed herein on March 9, 1992, by counsel for defendants.

4. "PETITIONERS' MOTION FOR ENTRY OF A PROTECTIVE ORDER TO ALLOW THE FILING OF EXHIBITS UNDER SEAL" filed herein on February 28, 1992, by counsel for the petitioners.

5. "EMERGENCY MOTION OF PETITIONERS FOR A FURTHER STAY OF THE DISTRICT COURT'S ORDER OF FEBRUARY 27, 1992 UNTIL TWENTY DAYS AFTER A FINAL ORDER IS ENTERED WITH RESPECT TO THE PETITION FOR WRIT OF MANDAMUS" filed herein on March 9, 1992, by counsel for the petitioners.

On consideration thereof,

IT IS ORDERED that the PETITIONERS' MOTION FOR ENTRY OF A PROTECTIVE ORDER TO ALLOW THE FILING OF EXHIBITS UNDER SEAL is GRANTED.

IT IS FURTHER ORDERED THAT THE PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND THIRD-PARTY DEFENDANTS, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, AND BAIN CLARKSON, LIMITED is DENIED and the EMERGENCY MOTION OF PETITIONERS FOR A FURTHER STAY OF THE DISTRICT COURT'S ORDER OF FEBRUARY 27, 1992 UNTIL TWENTY DAYS AFTER A FINAL ORDER IS ENTERED WITH RESPECT TO THE PETITION FOR WRIT OF MANDAMUS IS DENIED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 21, 1992

Before:

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

No. 88 C 9838

GEORGE LINDBERG, *Judge*
BERNARD WEISBERG, *Magistrate Judge*.

No. 92-1478

In the Matter of Petitioners,

CLARKSON PUCKLE GROUP, LIMITED, et al.

INTERNATIONAL INSURANCE COMPANY,

Plaintiff,

—VS.—

CERTAIN UNDERWRITERS AT LLOYD'S et al.,

Defendants.

KEITH WILLIAM KERR, et al.,

Counter-Plaintiffs,

—VS.—

INTERNATIONAL INSURANCE COMPANY,

Counter-Defendant.

INTERNATIONAL INSURANCE COMPANY,

Counter-Defendant/
Third-Party Plaintiff,

—VS.—

SOCIETE COMMERCIALE DE REASSURANCE S.A., CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, and BAIN CLARKSON, LIMITED,

Third-Party Defendants.

ORDER

On consideration of the petition for rehearing, with suggestion for rehearing en banc filed by defendants and third-party defendants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
George W. Lindberg

Case Number
88 C 9838

Date
May 27, 1992

Case Title
INTERNATIONAL INSURANCE CO. v. CERTAIN
UNDERWRITERS

MOTION:

Plaintiff's motion to withdraw

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]
Plaintiff, International Insurance Company i
leave to withdraw their objections to Magistra
Weisberg's December 20, 1992, report and
mendation on the Clarkson defendants' motio
pending arbitration.

* * * * *

X No notices required.

* * * * *

SB courtroom deputy's initials

* * * * *

ED-5
RECEIVED FOR DOCKETING
92 MAY 27 PM 6:20

Date/time received in
central Clerk's Office

MAY 28 1992 date docketed

KS docketing dpty. initials

* * * * *

Document #1121

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
George W. Lindberg

Case Number
88 C 9838

Date
June 12, 1992

Case Title
INTERNATIONAL INSURANCE COMPANY v. CERTAIN UNDERWRITERS

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]
Motion of "Clarkson Defendants" for an order accepting the report and recommendations of U.S. Magistrate Judge Bernard Weisberg of December 20, 1991 concerning the Clarkson defendants' motion to stay arbitration is granted.

* * * * *

X No notices required, advised in open court.

* * * * *

SB courtroom deputy's initials

* * * * *

ED-6
RECEIVED FOR DOCKETING
92 JUN 12 PM 5:54

Date/time received in
central Clerk's Office

JUN 15 1992 date docketed

KS docketing dpty. initials

* * * * *

— Document #1135

* * * * *

APPENDIX K

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15, renumbered Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)